4-1-2013

State v. Tapia-Lopez Respondent's Brief Dckt. 40208

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40208
Plaintiff-Respondent,	)	
	)	Minidoka Co. Case No.
vs.	)	CR-2010-857
	)	
JOSE TAPIA-LOPEZ,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Tapia-Lopez appeals from the district court's order denying his oral I.C.R. 35 motion for reduction of sentence. Tapia-Lopez also challenges the Idaho Supreme Court's order denying his motion to augment the appellate record.

Statement of Facts and Course of Proceedings

According to a police report appended to the presentence report ("PSI"), on September 17, 2009, a confidential informant ("CI") cooperating with the Mini-Cassia Drug Task Force in Heyburn (Minidoka County), Idaho made a telephone call to Desiree Johns to purchase one-quarter ounce of methamphetamine. (PSI, p.15.) Ms. Johns called the CI back and said it would cost $500 for the drug and he should go to her house to get it. (Id.) Shortly after the CI entered Johns' house, Tapia-Lopez arrived in a black Mustang and went into the house through the back door. (Id.) While the CI waited in Ms. Johns' bedroom with her infant child and 12 to 13 year old daughter, Ms. Johns asked Tapia-Lopez if $460 was "ok" for one-quarter ounce of methamphetamine. (Id.) The CI and Ms. Johns went to another bedroom where she used digital scale to weigh the methamphetamine. (Id.) The CI gave Ms. Johns $460 and she gave him a piece of tin foil that contained two plastic baggies of methamphetamine. (Id.)

On September 23, 2009, the CI arranged with Ms. Johns to buy one-eighth ounce of methamphetamine at her house. (PSI, p.16.) When the CI went

into the house, he talked to Ms. Johns, Tapia-Lopez, and an unknown male in a bedroom. (Id.) The CI asked about the possibility of purchasing an ounce of methamphetamine in the future, and Tapia-Lopez told him it would cost $1300. (Id.) The CI gave Ms. Johns $260, and Tapia-Lopez took what appeared to the CI to be an ounce of methamphetamine from his pants pocket, weighed out some of it, and put the extra back in his pants pocket. (Id.) Ms. Johns gave the CI a baggie that contained 3.9 grams of methamphetamine.[1] (Id.)

On October 28, 2009, Tapia-Lopez was a passenger in a black Mustang driven by Javier Cgovano in Burley, Idaho. (PSI, pp.1-2, 17.) A Cassia County Sheriff's Deputy attempted to stop the vehicle after observing Cgovano commit some traffic violations, but the car sped away for several blocks before stopping. (PSI, p.2.) Tapia-Lopez informed the officer that he had convinced Cgovano to stop the car. (Id.) Cgovano was arrested for reckless driving, and Tapia-Lopez was searched. (Id.) An orange and white smoking device was found in his jacket pocket, and a baggie with four individual baggies that held a substance that field tested positive for amphetamine, were found inside the floorboard carpet on the passenger side of the front seat. (Id.) The bag also held two pipes. (Id.) Tapia-Lopez was found to possess $623.72 in cash, and a digital scale was located in the back seat of the car. (Id.)

[1] Although the report did not directly say it, the baggie of methamphetamine Ms. Johns gave to the CI was presumably the same methamphetamine weighed out by Tapia-Lopez moments earlier.

The state charged Tapia-Lopez with two counts of delivery of a controlled substance (methamphetamine).[2] (R., pp.18-21.) Pursuant to a plea agreement, Tapia-Lopez pled guilty to one Count I and the state dismissed Count II. (R., pp.43-57, 66-68.) The district court imposed a unified twelve-year sentence with three years fixed, but retained jurisdiction for one year. (R., pp.60-65.) After his period of retained jurisdiction, and with a favorable recommendation from NICI, the district court placed Tapia-Lopez on probation for the term of his suspended sentence. (R., pp.74-76; APSI, p.1.) About one month later, the state filed a motion to revoke probation based Tapia-Lopez's illegal re-entry into the United States after he was deported, and his failure to report to probation for supervision. (R., pp.81-85; Tr., p.8, Ls.3-8.) At a probation revocation hearing, Tapia-Lopez admitted he violated the terms of his probation as alleged. (Tr., p.4, L.9 – p.6, L.8.)

Prior to disposition at the same hearing, Tapia-Lopez's counsel asked the court to reconsider Tapia-Lopez's original sentence and to reduce the fixed portion to one year (instead of three) to allow him to be turned over to federal authorities sooner for prosecution on federal charges. (Tr., p.4, Ls.9-17; p.7, Ls.13-21.) The district court ordered Tapia-Lopez's probation be revoked and his original sentence imposed, and also rejected his oral motion to reduce the fixed

[2] In Cassia County, Tapia-Lopez was charged with possession of a controlled substance (methamphetamine) with intent to deliver. (PSI, p.17.)

portion of his sentence. (R., pp.106-108; Tr., p.7, L.25 – p.8, L.16.) Tapia-Lopez filed a timely appeal. (R., pp.109-111.)

ISSUES

Tapia-Lopez states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Tapia-Lopez due process and equal protection when it denied his Motion to Augment with the requested transcripts?

2. Did the district court abuse its discretion when it denied Mr. Tapia-Lopez's oral Rule 35 motion requesting leniency?

(Appellant's Brief, p.3)

The state rephrases the issues on appeal as:

1. Has Tapia-Lopez failed to establish that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record?

2. Has Tapia-Lopez failed to show the district court abused its discretion by denying his Rule 35 motion for leniency?

ARGUMENT

I.
Tapia-Lopez Has Failed To Establish That The Idaho Supreme Court Violated His Constitutional Rights By Denying His Motion To Augment The Appellate Record

A. Introduction

Tapia-Lopez argues that the Idaho Supreme Court violated his rights to due process, equal protection, and effective assistance of counsel by denying his motion for augmentation with transcripts of the June 28, 2010 change of plea hearing, the August 11, 2010 sentencing hearing, and the January 10, 2011 "rider review" hearing. (Appellant's Brief, pp.4-18.) Because Tapia-Lopez has failed to establish that the transcripts are necessary for consideration of the issues raised on appeal, he has failed to demonstrate any violation of his Constitutional rights.[3]

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

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[3] If this case is assigned to the Idaho Court of Appeals, it is without authority to directly review, and find erroneous, a decision of the Idaho Supreme Court. State v. Morgan, 153 Idaho 618, ___, 288 P.3d 835, 837 (Ct. App. 2012).

C. The Requested Transcripts Are Not Necessary For Fair Consideration Of The Issue On Appeal

A defendant in a criminal case has a due process right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. Of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)); see also State v. Morgan, 153 Idaho 618, ___, 288 P.3d 835, 838 (Ct. App. 2012). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 123 (1996) (indigent appellant has right to "a transcript of relevant trial proceedings").

Rather, an indigent defendant is entitled, at state expense, to only those transcripts and portions of the record necessary to pursue the issues raised on appeal. Griffin, 351 U.S. 12; Lane, 372 U.S. 477. "[T]he State must afford [the indigent appellant] a record complete enough to allow fair appellate consideration of his claims." S.L.J., 519 U.S. at 121. To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. See State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho

148, 438 P.2d 893 (1968)). See also United States v. Smith, 292 F.3d 90, 93 (1st Cir. 2002).

This Court has appellate jurisdiction only to review the district court's order denying Tapia-Lopez's oral Rule 35 motion for reduction of sentence after the court revoked his probation and ordered his original sentence imposed.[4] (Compare I.A.R. 14(a) (notice of appeal must be filed within 42 days of order challenged on appeal) with R., pp.109-111 (notice of appeal filed within 42 days after order revoking probation and imposing sentence).) Tapia-Lopez has been afforded a full transcript of the hearing that resulted in that order. (12/13/11 Tr.; 5/4/12 Tr.) Transcripts of the guilty plea, sentencing, and rider review hearings are unnecessary because this Court lacks appellate jurisdiction to review the orders that issued from those respective hearings. More importantly, transcripts of those hearings were not prepared and were not presented to the district court in relation to the probation violation proceedings and there is no indication that what was said at those hearings played any role in the ruling challenged on appeal – the denial of Tapia-Lopez's oral Rule 35 motion. The transcripts are simply unnecessary for appellate review of the only order within the scope of this Court's appellate jurisdiction.

[4] Although this Court would have appellate jurisdiction to review the district court's decision to revoke Tapia-Lopez's probation and impose his original sentence, he has not challenged those orders on appeal – only the court's denial of his oral Rule 35 motion following the first two orders.

Tapia-Lopez first asserts that without the denied transcripts the record will be incomplete and his claim will not be reviewed on its actual merits. (Appellant's Brief, p.10.) He does not even posit *how* the transcripts are necessary, however. (Id.) A naked statement that the transcripts are necessary is not proof that rights were violated.

Tapia-Lopez next asserts that "a court is entitled to utilize knowledge gained from its own official position and observations" and therefore a defendant is entitled to any transcript that might have contributed to the knowledge gained by the judge. (Appellant's Brief, pp.10-12 (citing cases).) Accepting this reasoning would, taken to its logical conclusion, entitle every criminal appellant to a transcript of every hearing ever presided over by the trial judge; a proposition unsupportable in the law. In this case the record establishes that all of the *evidence* presented in the hearings Tapia-Lopez wants transcribed is in the appellate record. The PSI and APSI are in the record and no witnesses were called at the three hearings Tapia-Lopez wants transcribed. (R., pp. 43-44, 59, 73.) Tapia-Lopez's argument is necessarily that some argument or comment—by himself, the attorneys, or the judge—was so influential at the probation revocation proceeding held approximately one and one-half years later that a transcript of the earlier proceedings is necessary to review for an abuse of the district court's discretion. This argument is, at best, speculative. The current record is more than adequate for appellate review of the claim that the district

court abused its discretion by denying Tapia-Lopez's oral Rule 35 motion after it revoked probation and imposed his original sentence.

The requested transcripts are not necessary to pursue the appellate claim of abuse of discretion in the district court's denial of Tapia-Lopez's oral Rule 35 motion requesting leniency. Tapia-Lopez's speculative claim that he cannot have a fair review of the merits of his issue without the requested transcripts do not establish a violation of his Constitutional rights to due process, equal protection, or effective assistance of counsel.

II.
Tapia-Lopez Has Failed To Show The District Court Abused Its Discretion By Denying His Rule 35 Motion For Leniency

A. Introduction

Tapia-Lopez next asserts that the district court abused its discretion when it denied his oral Rule 35 motion for leniency.[5] (Appellant's Brief, pp.19-22.) However, because Tapia-Lopez has failed to establish an abuse of discretion, this Court must affirm the district court's sentencing determination.

[5] At the beginning of the probation revocation hearing, Tapia-Lopez's counsel informed the district court that Tapia-Lopez would be admitting the violation and intended to "go ahead with disposition, expecting the imposition or asking that the court may reconsider the three-plus-nine-for-twelve sentence that was imposed." (Tr., p.4, Ls.19-22.)

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Acted Well Within Its Sentencing Discretion In Denying Tapia-Lopez's I.C.R. 35 Motion

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Tapia-Lopez must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id.

At the outset of the probation revocation hearing, Tapia-Lopez's counsel informed the district court:

> Your Honor, in this particular case I believe [Tapia-Lopez has] already been sentenced in Cassia County as [sic] time imposed. He has charges of interest with the federal authorities, so they intend to take and prosecute him, so it's our intent in this case to admit that he violated conditions of probation as set forth: That he returned to the United States without proper documentation and did not report as required to probation and parole for supervision.

(Tr., p.4, Ls.9-17.) After Tapia-Lopez admitted the probation violations, his counsel recommended that the fixed portion of Tapia-Lopez's sentence be reduced from three years to one year, explaining, "that may give the Board of Corrections [sic] a chance to turn him over earlier than they might otherwise and

let the federal authorities – we're not sure if they'll take him before his fixed time is done. So we'd ask the court to consider reducing the time to one year and then we'll see what happens with the federal authorities." (Tr., p.7, Ls.16-21.) That was the only new information presented to the district court at the probation revocation hearing.

The district court was not persuaded to reduce Tapia-Lopez's fixed term in the hope that federal authorities would take custody over him earlier. The court explained:

> The court is well aware that in Cassia County Case 2009-7587 I did revoke your probation last week and imposed sentence, therefore you're not a candidate for probation at this time. Your conduct in this case was willful and warrants revocation of probation by returning to the United States illegally, when you were advised not to do so as a term and condition of probation, and by failing to report to probation for supervision as required by the terms and conditions of your probation. Therefore I will revoke your probation, impose the suspended sentence. The request to modify the original sentence is a matter of discretion with the court. That sentence was the product of a plea agreement that was imposed by the court pursuant to that plea agreement. At this point I'm not persuaded that there's any reason to now change the plea agreement and modify that sentence, so I will not do so.

(Tr., p.7, L.25 – p.8, L.16.)

The district court denied Tapia-Lopez's Rule 35 motion to reduce the fixed portion of his sentence to one year in light of his unlawful return to the United States after being deported and failure to report to probation for supervision, and because the court was not presented with any compelling reason to grant such reduction. The mitigating factors Tapia-Lopez cites on appeal were all reflected

in the record and presumably well known before he violated his probation in 2011 by returning to the United States illegally and failing to report for supervision. Those apparently undisputed factors[6] led the court to give Tapia-Lopez two earlier opportunities to remain on probation and out of prison: (1) placing him on a rider, which he successfully completed; and (2) placing him on probation. None of the mitigating factors cited by Tapia-Lopez (i.e., the nature of the offense, substance addiction, work ethic, good performance in rider programs) constituted new information to the court when it considered Tapia-Lopez's oral Rule 35 motion.

Tapia-Lopez also "argues that his deportation status is a mitigating factor[,]" and that "[t]he harshness of the deportation is exacerbated because of his significant ties in the United States." (Appellant's Brief, p.20.) However much deportation may serve as a mitigating factor in some situations, it is not a factor that can be addressed here because there has been no argument, much less showing, that a reduction of Tapia-Lopez's fixed term has any connection to whether he is subject to deportation. See State v. Tinoco-Perez, 145 Idaho 400, 179 P.3d 363 (Ct. App. 2008) (Rule 35 motion to reduce sentence was based on understanding that if the unified sentence was more than 364 days, defendant was subject to mandatory deportation, but not otherwise). Unless deportation

[6] At the probation revocation hearing, the prosecutor said that Tapia-Lopez had done "well" on his rider and then was deported, and that "the main obligation he had on probation was not to reenter the country illegally." (Tr., p.6, Ls.24.)

can be avoided by a reduction of a sentence, there is no justification for reducing a sentence, otherwise deserved, on the basis that the defendant will be returned to his or her country of origin after the sentence is served.

Further, Tapia-Lopez was deported after he was placed on probation following his rider and re-entered the country illegally. Tapia-Lopez's current risk of being deported does not differ from when he was originally sentenced, as the PSI noted in 2010, "[Tapia-Lopez] is not a legal resident and currently has a Border Patrol hold for deportation upon completion of his sentence in this matter." (PSI., p.8.) Therefore, Tapia-Lopez's anticipated deportation was not a "new" factor presented to the district court in his Rule 35 motion to reduce his sentence.

In sum, Tapia-Lopez has failed to show that his sentence is excessive in light of new or additional information subsequently provided to the district court in support of his motion to reduce his sentence. Huffman, 144 Idaho at 203, 159 P.3d at 840.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Tapia-Lopez's Rule 35 motion for leniency.

DATED this 1st day of April, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of April, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm